

No. 79-791

Supreme Court, U. S.

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In the Supreme Court of the United States

OCTOBER TERM, 1979

**CONSOLIDATED GAS SUPPLY CORPORATION,
PETITIONER**

v.

**FEDERAL ENERGY REGULATORY COMMISSION AND
PUBLIC SERVICE COMMISSION OF THE STATE OF
NEW YORK**

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT**

**MEMORANDUM FOR THE FEDERAL ENERGY
REGULATORY COMMISSION IN OPPOSITION**

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Petitioner, a natural gas company, contends that the Commission¹ failed to follow the standards set forth in *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944), and *Bluefield Waterworks and*

¹The orders under review were issued by, and proceedings to review those orders were instituted against, the Federal Power Commission. Thereafter, the Federal Energy Regulatory Commission succeeded to certain functions of the Federal Power Commission, including "the establishment * * * of rates and charges for the transportation and sale of natural gas by a * * * natural gas company under sections 1, 4, 5, and 6 of the Natural Gas Act * * *." Department of Energy Organization Act, Sections 401(a), 402(a)(1)(C), 42 U.S.C. (Supp. I) 7171(a), 7172(a)(1)(C). The

Improvement Co. v. Public Service Commission, 262 U.S. 679, 692-693 (1923), in prescribing the allowable return on its common equity for the period covered by certain rate filings, and that the Commission's decision is not supported by substantial evidence. Petitioner also asserts that the Commission failed to explain the basis for its decision, and that the Commission used the company's settlement proposal as evidence against it.

1. In May 1973, May 1974, and April 1975, Consolidated filed proposed increases in its rates subject to the Commission's jurisdiction (Pet. App. A-3, A-21 to A-22). These rates were suspended (*id.* at A-21 to A-22) and then placed into effect subject to refund (Pet. App. A-3).

While these filings were pending before an Administrative Law Judge for decision, an assistant general counsel for the Commission sent a letter to Consolidated's counsel stating that the Commission had determined that settlement of the issues presented by the filings would be in the public interest and asking Consolidated to submit, pursuant to 18 C.F.R. 1.18, a settlement proposal (Pet. App. A-3 to A-4).

Consolidated submitted a settlement proposal which resolved "all cost of service issues raised [by the 1973, 1974, and 1975 filings], with the exception of rate of return, which the parties [contested] in comments to the Commission" (Pet. App. A-20). Several parties filed

proceedings to review the orders of the Federal Power Commission continued with the Federal Energy Regulatory Commission substituted therefor (DOE Act, Section 705(c)—(e), 42 U.S.C. (Supp. I) 7295(c)—(e)). Herein, the term "Commission" will denote either the Federal Power Commission or the Federal Energy Regulatory Commission, as the context indicates.

comments on the rate of return issue, and Consolidated and the Commission Staff filed reply comments (Pet. App. A-4 & n.3, A-22 to A-23).

The Commission then "approve[d] the settlement agreement and establish[ed] a fair rate of return" for all three filings (Pet. App. A-21; see also *id.* at A-4 to A-5). The Commission evaluated the five criteria considered by Consolidated in setting its proposed rates of return (Pet. App. A-30 to A-38, A-61 to A-62). In applying those criteria, it found Consolidated's high common equity ratio, which was in excess of 50% (Pet. App. A-28, A-37 to A-38, A-55 to A-59, A-61 to A-62; see also *id.* A-14 to A-16),² to be "a major factor to be considered in these proceedings" (*id.* at A-38).³

The court of appeals dismissed the petition for review and ordered the orders enforced (Pet. App. A-1 to A-16). The court subsequently denied an application for rehearing. (Pet. App. A-17).

2. The decision below presents no conflict, no issue of importance, and is correct. It does not warrant this Court's review.

There is no merit to Consolidated's claim (Pet. 8-9) that the Commission failed to follow the standards of *Hope* and *Bluefield*. The court of appeals found that the Commission had evaluated the "five criteria which

²The "common equity ratio" is the ratio of a company's common equity to its total capital expressed as a percentage (see Pet. App. A-28).

³On rehearing, the Commission remanded the 1975 filing for further proceedings on the rate of return issue. The court of appeals was concerned only with the validity of the rate of return established for the period covered by the 1973 and 1974 filings (Pet. App. A-2 & n.2, A-3).

Consolidated had considered in establishing its proposed rates of return: current market conditions, the yield and growth rate available to investors, earnings on book value, market to book ratio, and future capital needs. The Commission then discussed the record evidence in detail, often contrasting Consolidated's testimony and calculations with those offered by the Commission's staff. This discussion is replete with specific citations to the record" (Pet. App. A-14; see *id.* A-30 to A-39). Following this discussion, the Commission established a return on common equity for Consolidated (*id.* at A-14 to A-16).

Consolidated has more equity in its capital structure than many comparable companies (see Pet. App. A-37 to A-38, A-55 to A-56). Its "substantial evidence" argument is but a reassertion of the claim made below that the "Commission gave greater weight to this factor than Consolidated thought was appropriate" (Pet. App. A-15). The court of appeals, however, found that after reviewing all the evidence, the Commission properly "concluded that the relatively low financial risk enjoyed by Consolidated because of its high equity ratio was to be a major factor in the rate decision" in keeping with "recent precedent" (Pet. App. A-16). It then held that "the Commission [had chosen] a rate of return on equity which, allowing for the difference of equity ratios, placed Consolidated 'within the zone of reasonableness' determined by its precedent for the relevant period" (*ibid.*), and that the result was "fully supported by substantial record evidence" (*id.* at A-15, A-16).⁴

⁴Consolidated errs in asserting (Pet. 11 n.11) that the decision in *Tennessee Gas Pipeline Co., et al. v. Federal Energy Regulatory Commission*, 606 F. 2d 1094 (D.C. Cir. 1979), petition for cert. pending, No. 79-962 (filed December 19, 1979), undermines the Commission's decision in this case. In that case, the Commission had increased the allowed return on equity because it had excluded

The court of appeals correctly rejected Consolidated's contention (Pet. 13-15) that the Commission's reasoning process should have been spelled out in greater detail (Pet. App. A-15). It concluded that "the Commission's path to decision was sufficiently clear to permit [its] review" (*id.* at A-16), and that the Commission had adequately explained its decision (*id.* at A-15 to A-16).⁵

Finally, the court of appeals correctly held that Consolidated was not prejudiced by the Commission's having improperly used the settlement proposals as evidence against Consolidated's position (Pet. App. A-10 to A-11). It found that the "use occurred in the context of the Commission's discussion of a subsidiary issue: the weight to be accorded certain studies in the record before the Commission" (Pet. App. A-11 to A-12), that "an independent basis existed in the record for this subsidiary conclusion" (*id.* at A-12), and that "the same result would have obtained absent the improper reference" (*ibid.*).

certain advance payments from Tennessee's rates. (*id.* at 1119-1120 & n.94). After ruling that the Commission had improperly excluded the advance payments (*id.* at 1119), the court of appeals remanded the rate of return issue as well as the advance payments issues because the Commission had linked the two matters (*id.* at 1119-1120, 1122-1123). The implication of that decision is that the return on equity might be excessive if all or part of the advance payments are included in Tennessee's rates (*ibid.*).

⁵The court noted that the "apparent inconsistency" in the Commission's order (see Pet. 14-15) was caused by "an incorrect reference" which was deleted by an errata notice (Pet. App. A-5 & n.4). The Commission also explained the correction in the order on rehearing (Pet. App. A-54 to A-55).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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